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July 21, 1988

Mr. Stephen A. Beyer
Safety Engineer
New Hampshire Department of Labor
19 Pillsbury Street
Concord, NH 03301

Re: Revision of 29 CFR 1910.1200

Dear Mr. Beyer:

You have requested our opinion regarding the effect of revisions to the Hazard Communication Standard (HCS)(codified in relevant part at 29 CFR Part 1910.1200) on the Labor Department's enforcement activities under the Worker's Right to Know Act (WRKA)(codified at RSA 277-A:1-10 (1987)).

After reviewing the revisions, applicable statutes and court decisions applying earlier versions of the rules I have concluded that the proposed revisions to the HCS will pre-empt the Labor Department from enforcing the WRKA with respect to employers in the non-manufacturing sector.

BACKGROUND

The HCS was first promulgated in 1983. See 29 C.F.R. §1910.1200 at 957 (1987). The HCS originally required manufacturers and importers to provide information to their employees about the hazardous chemicals to which they were exposed by means of a hazard communication program, labels, material safety data sheets and training programs. See 29 C.F.R. §1910.1200 (b) (1). The HCS pre-empted state laws requiring employers in the manufacturing sector to communicate information about hazardous chemicals to their employees but did not pre-empt the application of those laws to the

nonmanufacturing sector. See 29 C.F.R. §1910.1200 (a) (2); Manufacturers Association of Tri-County v. Knepper, 801 F.2d 130 (3d Cir. 1986), cert. denied 56 U.S.L.W. 3242 (Oct. 6, 1987).

In August 1987 the Occupational Safety and Health Administration (OSHA) of the United States Department of Labor proposed revisions of the HCS. The proposed revisions expanded the HCS to cover employers in the nonmanufacturing sector. 52 Fed. Reg. 31852, 31860 (1987)(to be codified at 29 C.F.R. §1910.1200). The background description published with the proposed rules stated:

> Any State or local government provision requiring the preparation of material safety data sheets, labeling of chemicals and identification of their hazards, development of written hazard communication programs including lists of hazardous chemicals present in the workplace, and development and implementation of worker chemical hazard training for the primary purpose of assuring worker safety and health, would be preempted by the HCS unless it was established under the authority of an OSHA-approved State plan.

52 Fed. Reg. at 31861.[1] With only three minor exceptions that are not relevant for present purposes, the proposed revisions went into effect on May 24, 1988. 53 Fed. Reg. 15033-35 (1988).

The WRKA applies to all private and public employers in New Hampshire. See RSA 277-A:3 III (1987). Its purpose is to require employers to provide their employees with all available information concerning the nature of the toxic substances to which such employees may be exposed during the course of their employment and to inform their employees of the suspected hazards related to these substances and to take all other practicable and feasible measures to protect their employees from the risks of toxic substances. RSA 277-A:2 (1977). The WRKA requires employers to maintain material safety data sheets, RSA 277-A:4, to make the sheets available to workers, RSA 277-A:5 I, to post certain signs, RSA 277-A:5 II, to educate workers, RSA 277-A:5 IV, and to send copies of the sheets to local fire departments, RSA 277-A:5 VII.

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[1] This pre-emption is meant to apply to all state or local laws which relate to an issue covered by a federal standard without regard to whether the state law conflicts with, supplements or is stricter than federal requirements. 52 Fed. Reg. at 31860. Where OSHA has issued a standard, states are barred from acting unless a federally approved state plan is in effect. Id.

You have told me that the Labor Department, on informal advice previously obtained from this office, has not applied the WRKA to manufacturing establishments in New Hampshire.

You have asked what effect the proposed changes to the HCS will have on your department's enforcement of the WRKA.

DISCUSSION

Your question requires us to evaluate the likelihood that a court would find that the WRKA is pre-empted, or superseded by, federal regulation. In determining whether a state statute is pre-empted by federal law, courts generally apply three tests. A court may look for express preemption on the face of the federal statute because when Congress passes a valid law it is within Congress' power to expressly declare that state law is pre-empted. Where there is no express preemption a court may then look to the legislative intent of the federal legislation. For example; when Congress passes a law that establishes a comprehensive scheme of federal regulation a court may infer that Congress intended to pre-empt a state statute in the same field on the ground that Congress left no room for the state statute to operate. Finally a court may compare the state statute with the federal statute to determine if the two conflict. Where state law conflicts with federal law (either where it is impossible for citizens to simultaneously comply with both laws or where the state law stands as an obstacle to the accomplishment of the goals of the federal law) a court will find that the state law is preempted. California Fed. Sav. & Loan Assn. v. Guerra, ___ U.S. ___, 93 L.Ed.2d 612, 623 (1987). Federal regulations are generally entitled to no less of a pre-emptive effect than federal statutes. Fidelity Fed. Sav. & Loan Assn. v. Cuesta, 458 U.S. 141, 153-54 (1982).

The United States Court of Appeals for the Third Circuit determined that statutes similar to the WRKA were preempted by the HCS. Manufacturers' Assoc. of Tri-County v. Knepper, 801 F.2d 130 (3d Cir. 1986), cert. denied 56 U.S.L.W. 3242 (Oct. 6, 1987); New Jersey Chamber of Commerce v. Hughey, 774 F.2d 587 (3d Cir. 1985). In both cases the court compared each section of the state statute to comparable provisions of federal statutes and regulations to determine whether the state statute was pre-empted. Where the court determined that a portion of the state statute was pre-empted it then determined whether the pre-empted portion could be severed from the rest of the statute, leaving the rest of the statue enforceable. It is likely that in determining whether the WRKA is pre-empted a court here would apply a similar test.[2]

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[2] The pre-emption analysis would be unnecessary for the purpose of determining whether the WRKA is pre-empted with respect to the state and its political subdivisions, because Congress has expressly determined that OSHA does not reach them. 29 U.S.C. §652 (5) (Definition of "employer" does not include states or their political subdivisions). Thus the WRKA may still be applied to the state and its political subdivisions.

1. Pre-emption of the WRKA

As noted above the purpose of the proposed revisions of 29 C.F.R. §1910.1200 (a)(2) is to expand the scope of federal pre-emption. Indeed, the explanatory material published with the proposed rules declares that state laws passed "for the primary purpose of ensuring workplace safety and health, would be preempted by the HCS unless it was established under the authority of an OSHA-approved State plan." 52 Fed. Reg. at 31861 (emphasis added). RSA 277-A:4 prohibits the purchase, manufacture, transportation and distribution of toxic substances unless a material safety data sheet accompanies the substance. RSA 277-A:5 generally requires that those data sheets be made available to workers. Even if it is assumed that the statute's requirements for material safety data sheets, RSA 277-A:3 IV, are consonant with federal law, 277-A:4 and 277-A:5 as they pertain to worker notification and training would be pre-empted in their entirety because there are similar federal requirements directly on point. See 29 C.F.R. §1910.1200 (g)(material safety data sheets); 29 C.F.R. §1910.1200 (h)(worker training and information).

RSA 277-A:5 VII requires employers to send copies of all applicable material safety data sheets to their local fire department. It is apparent that the purpose of this provision is not to protect the employers' own workers, but rather to protect firefighters and nearby residents in the case of a fire or similar emergency. This provision would not be pre-empted by the HCS because its primary purpose is not to protect workplace safety and health.[3]

The provisions of the WRKA that apply to remedies, penalties and inspections, RSA 277-A:6 - 9, would not be pre-empted to the extent that they would stand after the pre-empted portions of the statute were excised. See Hughey, 774 F.2d at 594 n. 4. The same would hold true for the popular name, 277-A:1, declaration of legislative purpose, RSA 277-A:2, and the definitions of the WRKA, RSA 277-A:3. Id.

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[3] Furthermore, this provision would not be pre-empted by Public Law 99-499, the Community Right to Know Law which applies generally to state emergency planning, because that law expressly provides that it does not pre-empt "any State or local law," 42 U.S.C. §11041 (a).

2. Severability

Having determined that portions of the WRKA are pre-empted, whether the next issue is offending portions of the statute could be severed from the statute, leaving the remaining portions enforceable.

Generally a portion of a statute may be stricken where it appears that the legislature would have enacted the statute without the offending provision. Belkner v. Preston, 115 N.H. 15, 20 (1975). In determining whether the legislature would have passed a portion of the statute a court would look at the primary purposes of the statute. Id. A court would presume that the legislature intended that the invalid part shall not produce entire invalidity if the valid part may be reasonably saved. Carson v. Maurer, 120 N.H. 925, 945 (1980). The court would also have to determine, however, whether the pre-empted portions of the statute are so integral and essential to the general structure of the act that they may not be rejected without resulting in the entire collapse of the statute's structure. Id.

The resolution of the above factors is a close question. On the one hand it could be said that the pre-empted portions of the statute constitute most of the subject matter originally intended to be reached by the original statute. See RSA 277-A:1. The entire statute would thus fall because the pre-empted portions would be classified as integral and essential to the general structure of the WRKA.

The better view, in our opinion, is that the Legislature would have adopted the WRKA without the offending provisions. One court has noted that statutes are often found to be inseverable where severing a provision causes the statute to become broader than originally intended by the legislature. Hughey, 774 F.2d at 597. But see Rosenblum v. Griffin, 89 N.H. 314, 320 (1938)(severing unconstitutional provision from statute and broadening statute to preserve underlying statutory plan). It further observed that statutes are often found to be severable where severing the invalid portion results in a slightly less comprehensive regulation, but is more consistent with the legislative intent than striking down the entire statute and leaving no regulation at all. Id. Accord, Belkner, 115 N.H. at 19 (excising differential statute of limitations where that decision narrowed application of statute, but preserved underlying intention of legislature); Fernald v. Bassett, 107 N.H. 282, 285 (1966)(portion of zoning ordinance containing unconstitutional delegation of power could be separated from rest of statute where it was likely that town would have enacted constitutional portion of ordinance).

Under the better view, the pre-empted provisions of the WRKA could be severed from the statute, leaving the rest of the statute intact. The legislative findings support the view that one of the primary purposes of the WRKA was to protect the community at large. RSA 277-A:1 ("The general court hereby finds . . . that the workplace often serves as an early warning mechanism for the outside environment."). Striking the offensive provisions from the WRKA would leave a narrower regulatory system but the modified system would still be consistent with the declared legislative purpose of protecting the community at large.[4]

CONCLUSION

Substantial portions of the WRKA are pre-empted by federal statute and regulation with respect to employers in the non-manufacturing sector. The pre-empted provisions of the WRKA are severable from the rest of the statute, thus allowing the other portions of the statute to be enforced.

This opinion has considered the effect of recently prromulgated regulations. It is possible that the federal government will promulgate further regulations in the area. You should thus consult the Federal Register for any updates to the regulations. You may also find that contemplated or actual enforcement actions give rise to questions not considered in this opinion. In that event you should again consult us for assistance in interpreting RSA 277-A and applicable regulations.

Thank you for your inquiry.

Very truly yours,

Charles T. Putnam
Assistant Attorney General
Civil Bureau

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[4] A minor related issue is to identify what material safety data sheets must be sent to local fire departments. You have informed me that under RSA 277-A:10 your department follows the "stricter requirements" of federal law and construes RSA 277-A:4 to require the same information to be reported on state material safety data sheets as is reported on federal material safety data sheets. An employer can thus comply with both federal law and the WRKA and RSA 277-A:5 IV could probably still be enforced even if RSA 277-A:4 were held to be entirely preempted.